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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 22 2007

WAC 04 101 54083

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Marie Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks to employ the beneficiary as its Director of Innovation. The petitioner asserts that the beneficiary qualifies for Schedule A, Group II designation. The director did not reach whether the beneficiary qualifies as an alien of exceptional ability. Rather, the director concluded that the beneficiary did not meet the job requirements set forth on the Form ETA-750 Application for Alien Employment Certification.

On appeal, counsel asserts that the alien meets the criteria for aliens of exceptional ability. Counsel further asserts that the job requirements set forth on the Form ETA-750 are irrelevant because there is no labor market test and the requirements for aliens of exceptional ability are set forth in the regulations, not by the employer. Counsel continues that Schedule A, Group II cases are "occupation specific and not employer-specific." Finally, counsel resubmits an earlier brief asserting that the beneficiary's experience is equivalent to the required degree. For the reasons set forth below, we find that the petitioner has not established that the beneficiary meets the requirements of the job offer. Moreover, even if we give deference to the petitioner's claimed intent and, thus, interpret the job offer requirements such that the beneficiary would meet them, the job offer would not require an advanced degree professional or an alien of exceptional ability.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Counsel is incorrect that the employer is irrelevant to occupations certified under Schedule A by the Department of Labor. First, the regulation at 8 C.F.R. § 204.5(k)(1) provides that any "United States employer may file a petition" under this classification. The only exception to the requirement that an employer file the petition under this classification is for petitions seeking a waiver of the job offer requirement in the national interest. The petitioner does not seek such a waiver in this matter. Moreover, the regulation at 8 C.F.R. § 204.5(k)(4) provides the following information regarding alien employment certification and Schedule A designation:

> (i) ***General.*** Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. *To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of the . . . Schedule A application . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.*

(Emphasis added.) Thus, the regulations expressly require an evaluation of the job offer requirements in Schedule A, Group II cases. Significantly, even where the employer does go through the alien employment certification process, the resulting certification is only determinative as to the domestic labor market. Citizenship and Immigration Services (CIS) still retains the ultimate authority as to whether the alien is qualified for the job certified. *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983). Counsel has provided no legal authority for the proposition that CIS does not have this authority in Schedule A, Group II cases.

In order to determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when an alien employment certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien employment certification to determine the required qualifications for the position. CIS may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1982); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). It is the language of the alien employment certification job requirements that will set the bounds of the alien's burden of proof. *Madany,* 696 F.2d at 1015.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien employment certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months

or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the alien employment certification reflects the following requirements:

Block 14:

Education:	4, Bachelor's degree or equiv. in Info. Tech., Comm. or Film Prod.
Experience:	6 years in the job offered or related occupation: Operations Management in motion picture and/or television post production.*
Block 15:	*Must include at least two years of Media Asset Management (MAM) project management.

In response to the director's request for additional evidence, counsel asserted that the beneficiary does meet the job requirements set forth on the alien employment certification because he has the equivalent of a bachelor's degree through work experience as permitted by the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D). The petitioner submitted an evaluation of the beneficiary's credentials, concluding that his experience alone is equivalent to a U.S. four-year baccalaureate degree.

The director noted that the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D) applies to a nonimmigrant classification. Similar language does not appear in the regulations relating to immigrant classifications.

The plain language of the alien employment certification does not support an intent to accept experience in lieu of education. As stated above, the alien employment certification requires "4" years of college. Even if we were to accept counsel's assertion that the "4" years of college and a "bachelor's degree or equiv." requirements do not actually demonstrate the need for a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree, then a new problem arises.

As stated above, the regulation at 8 C.F.R. § 204.5(k)(4) states that the job offer portion of the Schedule A application must require either an advanced degree or an alien of exceptional ability. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-

649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow an advanced degree professional position pursuant to section 203(b)(2) of the Act to require anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the job requirements allow experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to require the experience and education equating to an advanced degree under section 203(b)(2) of the Act, the job must require a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. Thus, if we accept counsel's implication that the alien employment certification permits the substitution of experience for education, we must conclude that the alien employment certification does not require an advanced degree alien.

We acknowledge that the petition seeks to classify the beneficiary as an alien of exceptional ability. On appeal, counsel asserts that there is "no real way to accurately depict the requirements/criteria for exceptional ability on the Form ETA 750 part A. If this were a real requirement, no Schedule A, Group II exceptional ability cases would be approved."

Counsel is not persuasive. First, the regulations require that the petitioner submit a Form ETA 750. If we were to accept counsel's appellate assertions, this requirement would be meaningless, as CIS has no authority to review the information listed on that form. Moreover, it would be illogical for CIS to approve a petition for an alien of exceptional ability who is not an advanced degree professional for a job that requires an advanced degree professional.

Finally, despite counsel's assertions to the contrary, several of the criteria for aliens of exceptional ability are amenable to being listed on the Form ETA 750. For example, the number of years of

experience is specifically requested in Box 14. In this matter, however, the petitioner listed only six years of experience, not ten as would be expected if the job required an alien of exceptional ability. In addition, the proffered wage could be indicative of exceptional ability and other special requirements in Box 15 could reflect other exceptional ability criteria such as licenses or memberships. While counsel has asserted that the proffered wage, $119,546 annually, is indicative of exceptional ability, the record lacks evidence of average wages for the beneficiary's occupation. We note that the petitioner affirms that it is actually paying the beneficiary $136,000 annually, significantly more than the proffered wage. While that may reflect well on the beneficiary, it does not suggest that the proffered wage listed on the Form ETA 750 is indicative of exceptional ability. Regardless, that would only be one criterion; exceptional ability requires that an alien meet three of the criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii).

In summary, precedent decisions that are binding on this office require that the beneficiary meet the job requirements set forth on the Form ETA 750. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position; CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The beneficiary does not have the degree specified on the Form ETA 750. Even if we were to accept that the petitioner intended experience to be equivalent to a degree, the ETA 750 would no longer require either an advanced degree professional or an alien of exceptional ability as required by the regulation at 8 C.F.R. § 204.5(k)(4). While counsel raises policy arguments against following the precedent decisions and regulations, those authorities are binding upon us. An agency abuses its discretion when it inexplicably departs from its own regulations. *Osei v. INS*, 305 F.3d 1205 (10th Cir. 2002). *See* 8 C.F.R. 103.3(c).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. As this decision is based solely on the job requirements, it is without prejudice to any future petition with a different job offer or in a classification that does not require a job offer.

ORDER: The appeal is dismissed.